80-1210

Supreme Court, U.S.
FILED
OCT 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

Pat Burlinson, Mitchell Smith, Joy Deck, Bobby Deck, Bertha Droke, H. W. Droke, Bette Droke, E. H. Felker, Bonnie Felker, Tom Felker, Ruby Merrick, David Don Pierce, Ronnie Hamlett, Clifford Hearing, Milva Keating, E. J. Langdon, Fannie Langdon, Joe Langdon, Jimie O. Lea, Sr., H. A. Lea, Jr., Jack Lee, Jane Mitchell, Beaulah Moore, Max R. Moore, Lorraine Smoak, James A. Jones, Leslie Kinchen, Marion E. Tucker, Bill Tucker, Larry Vance, Sammy Davis, Harold Scott, Glenda Scott, Ulous Vance, Luedell Vance, Imagene Young and Bob Hart,

Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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QUESTIONS PRESENTED

1. If the waters that caused landowners (farmers) damages are "backwaters" or "man-made" by the alleged negligent acts of the agents of the United States Army Corps of Engineers, rather than by unusual or extraordinary climactic conditions, is there a "flood" to give rise to the immunity extended the government under 33 U.S.C. 702(c) (Flood Control Act of 1928)?

(*NOTE*: The government did not brief nor argue this issue. Rather, it was skipped and general argument made on whether the United States is immune from damage caused by flood water. Thus, the government assumed and took for granted that there was a flood and then argued immunity. The Eighth Circuit did not so skip that issue but found that it had to be resolved first before the immunity issue and the co-issue of whether this was a "flood control project" could be reached and discussed. The Court of Appeals resolved the question of whether this was a "flood" against the Petitioners' on the basis of their pleading alone.)

The issue of whether it is proper to uphold such an affirmative defense at the pleading stage was also not reached or considered by the Eighth Circuit.

Thus, the other issues existing in the law suit were not reached by the Eighth Circuit when they decided that it makes no difference whether the damaging waters were "man-made" or made by nature (as will be stated below this decision is in conflict with another circuit's decision on that issue).

The purpose of this "*note*" is to emphasize that the issue in question presented above is the sole issue reached by the Eighth Circuit in their decision, and that this issue was not briefed by the government. (See Appendix 2, 3 and 4, for the complaint in question, the landowner's brief and the government's brief, respectfully).

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Petitioners above pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered July 11, 1980, which affirmed the dismissal of Petitioners' complaint by the District Court. Petitioners' are seeking relief from that dismissal and request a remand to the District Court for the Eastern District of Missouri for trial.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is contained in Appendix 1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1252 and 28 U.S.C. 1254. This is a civil case wherein the United States of America is a party and the citizens' Petition against the government has been dismissed by the United States District Court for the Eastern District of Missouri with said dismissal being affirmed by the United States of Appeals for the Eighth Circuit.

STATUTORY PROVISIONS INVOLVED

See Appendix 5 for the text of 33 U.S.S. 702(c), the statutory provisions herein involved.

STATEMENT OF THE CASE

Petitioners, a large group of landowners in Dunklin County, Missouri, had their Petition for damages, totaling close to One Million Dollars, against the government dismissed in the United States District Court for the Eastern District of Missouri and the dismissal of the complaint was upheld by the United States Court of Appeals for the Eighth Circuit. Thus, this is not an appeal from a decision after presentation of evidence but rather the appeal of the Court's sustaining of a motion to dismiss the complaint filed at the outset of the case.

Plaintiffs' complain that the Army Corps of Engineers failed to keep certain water gates clear of debris and failed to keep a pumping station operational and thus water backed up and damaged their crops. All of same occurred in what is commonly known in the local area as the "Big Lake Drainage District". This drainage district was established primarily for the protection of wild life and fish (this fact in relation to the protection of wild life and fish having been recently obtained by further investigation after the decision of the Appeals Court. Thus, there is a serious question whether the alleged negligent acts of the Corps were committed in connection with a "flood control project". The issue here being, however, as stated above, whether backwater caused by negligent acts of man is a "flood", not whether this is a flood control project). The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the Petition and stated very clearly that it could see "no significance in the fact that the flooding in this case may not have been caused by the unusual or extraordinary climactic conditions". The said Court applied the immunity of Section 702(c) without reference or distinction as to whether or not the flood was "man-made" "back-water" or whether the damage resulted from nature.

REASONS FOR GRANTING THE WRIT

The decision of the Eighth Circuit Court of Appeals in this case is in conflict with the decision of another court of appeals on the same matter. Specifically, same is in conflict with *Valley Cattle Company v. United States* 258 F. Supp. 12 (1966 D.C. Hawaii). The Court in *Valley* stated the following rules which are directly contrary to the ruling and decision herein.

> "Thus the purpose of the enactment in question was to avoid financial liability being placed on the federal government for 'Act of God' disasters, because of the enormous damage which results – often running into hundreds

> of millions of dollars. It seems plain that Congress did not intend to disclaim federal liability for water damage of every conceivable kind, but rather to exempt the government from liability for damage resulting only from events that could properly be described as 'flood'. (citing cases)
>
> It thus appears that if the inundation or 'flooding' of Plaintiff's pens was not ipso facto the result of climactic or storm conditions, but was rather caused by the negligent acts of government agents at an operational level, then §702 has no application and the Plaintiff may properly urge recovery of the Federal Tort Claims Act, 28 U.S.C. §§2671-2680.
>
> If the waters causing damages are 'man-made' a 'flood' does not occur."

The *Valley* decision very clearly draws the distinction as to whether or not the waters are a flood or not in direct relation to their cause, either man-made or by climactic conditions. The Appeals Court in the decision at bar has taken away that distinction and makes no significance of the factual situation which might be presented in regard to the existence of climactic conditions or man-made backwater. Thus, the two decisions are directly in conflict and should be resolved by this Court. If there is a "flood" then the questions as to whether this is a "flood control project" or whether this is a "wildlife and fish project" and the question of whether the Corps actions were "operational" or "discretionary" would be the next issues and could be resolved only after a trial on the merits which would present facts relevant to that issue. However, the Court of Appeals centered their decision upon the question as to whether or not there is a "flood" or not in the first place or instance in regard to imposing immunity. The *Valley* case indicates that there is a prior factual step which must be climbed and that is to determine whether same was "man-made" or

whether it was through "climactic conditions". The Petition should be remanded to the District Court where the case was filed so that they may present their unique factual situation to enable a determination to be made of all of these issues, as they are all properly "factual issues" and not subject to a summary motion to dismiss. *Huffmaster v. United States* 186 F. Supp. 120 (1960 D.C. California).

Any anlysis of the scope of immunity under 702c will find a myriad of cases going every direction possible. (For a list of these cases see Appendix 6). It is time for the Supreme Court to collect all the decisions in all the various circuits and make a decision to give positive direction to further litigation between aggrieved landowners and their government.

In any event, this case should be sent back for a hearing and presentation of facts, for it has been said "If the District Court must reach the question of the scope of immunity under 702c it should do so on the basis of a *"complete record"*. *Lunsford v. United States* 570 F 2d 221 (1977). This case has not been allowed the privilege of developing a complete record.

Respectfully submitted,

James R. Reynolds

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Attorneys for Petitioners

I certify that I have served a copy of Petitioners' Petition for Writ of Certiorari upon Anne Travis Shapleigh, United States Attorney, 1114 Market Street, St. Louis, Missouri 63101, by depositing a copy of same in a mailbox with first class postage prepaid this 7th day of October, 1980. I further certify that all parties required to be served have been served.

JAMES R. REYNOLDS /ss/
James R. Reynolds

Dated: October 7, 1980.

APPENDIX

APPENDIX

1. Opinion of the Eighth Circuit Court of Appeals..... A-1
2. Complaint A-6
3. Landowners (Appellant – Petitioners' here) Brief (J. David Ford, who wrote the Apellants' Brief is no longer with the firm, and this Petition for Certiotari is presented by James R. Reynolds who has taken over the responsibility of the case) A-24
4. The Government's Brief A-34
5. The Statutory Text of 33 U.S.C. 702(c) A-42
6. Cases Citation of Conflicting Decision on the Scope of Immunity Under 702(c) A-44

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 79-2023

PAT BURLISON, MITCHELL SMITH, JOY DECK, BOBBY DECK, BERTHA DROKE, H. W. DROKE, BETTE DROKE, E. H. FELKER, BONNIE FELKER, TOM FELKER, RUBY MERRICK, DAVID DON PIERCE, RONNIE HAMLETT, CLIFFORD HEARING, MILVA KEATING, E. J. LANGDON, FANNIE LANGDON, JOE LANGDON, JIMMIE O. LEA, SR., H. A. LEA, JR., JACK LEE, JANE MITCHELL, BEULAH MOORE, MAX R. MOORE, LORRAINE SMOAK, JAMES A. JONES, LESLIE KINCHEN, MARION E. TUCKER, BILL TUCKER, LARRY VANCE, SAMMY DAVIS, HAROLD SCOTT, GLENDA SCOTT, ULOUS VANCE, LUEDELL VANCE, IMAGENE YOUNG AND BOB HART,

Appellants,

v.

UNITED STATES OF AMERICA
Appellee.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Submitted: April 18, 1980
Filed: July 11, 1980

Before HEANEY and ARNOLD, Circuit Judges, and WRIGHT,* District Judge.
HEANEY, Circuit Judge.

*The Honorable SCOTT O. WRIGHT, United States District Judge for the Western District of Missouri, sitting by designation.

Plaintiffs-appellants appeal from the dismissal of their cause of action brought against the United States for negligently causing water to flood their property. The district court dismissed the claim with prejudice under Fed. R. Civ. P. 12(b).

Appellants are thirty-eight owners and/or tenants of land located in Dunklin County, Missouri. In their original complaint, the appellants alleged the following:

> That the Defendant, acting by and through Department of Army, Corps of Engineers, its contractors, agents and employees, in the vicinity of Big Lake area (dealing also with Little River Drainage District/Big Lake Drainage District Floodway, and Treasure Island and in vicinity along Ditch No. 81 of Little River Drainage District) enacted certain "control structures" and "access road" to same, as well as failed to place in operation the pumping plant on Treasure Island or to keep gates over or clear of drifts which dammed the natural flow of water, or alternatively said damming was the specific cause of water backing up in great amount, or alternatively, in so doing created a "man-made flood," thereby causing damage to the land and productivity or crops thereon belonging to this Plaintiff, as hereinafter set forth.

The appellees answered and filed a motion to dismiss, contending that the United States is entitled to absolute immunity from suit pursuant to (1) 33 U.S.C. § 702c (no liability for damage from or by flood waters) or (2) 28 U.S.C. § 2680(a) ("discretionary function" exception to the Federal Torts Claims Act). After examining the pleadings, the district court granted the government's motion to dismiss, concluding that the acts alleged to be negligent were discretionary functions and were thus not subject to suit under the Federal Torts Claims Act. The appellants amended their complaint to delete the clause "enacted certain 'control structures' and 'access road' to same" and replaced it with "*negligently designed and negli-*

gently constructed a road and drain in the area of same." The district court dismissed the amended complaint for the reasons cited in the original dismissal.

We need not decide whether the district court was correct in determining that the United States has not consented to be sued for the types of acts alleged in this case; we are convinced that 33 U.S.C. § *702c* precludes liability in any event. That section, a part of the Flood Control Act of 1928, provides: "*No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place* . . ." We have previously noted the breadth of this immunity and its importance in the statutory scheme:

> [W]hen Congress entered upon flood control on the great scale contemplated by the [Flood Control] Acts it safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest language. • • •
>
> • • • • •
>
> Undoubtedly that absolute freedom of the government from liability for flood damages is and has been a factor of the greatest importance in the extent to which Congress has been and is willing to make appropriations for flood control and to engage in costly undertakings to reduce flood damages.

National Mfg. Co. v. United States, 210 F.2d 263, 270-271 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954), *quoted in Taylor v. United States*, 590 F.2d 263, 265-266 (8th Cir. 1979).

Despite the appellants' assertions to the contrary in their brief, there can be no serious question that the alleged negligent acts of the Army Corps of Engineers were *committed in connection with a federal flood control project.* We have no doubt that the design, construction and maintenance of the access road should be considered to be part of the flood control

project. The complaint, even as amended, refers to drainage districts, a floodway and a pumping station that are clearly part of federal flood control efforts.[1]

The appellants assert, however, that even if a flood control project was involved, damage in this case was not due to "floods or flood waters" within the contemplation of 33 U.S.C. § 702c. At oral argument, counsel for appellants stated that their theory of liability, in onlegal terms, was that the Army Corps of Engineers built an access road with inadequately sized culverts, that these culverts became clogged with trees and other debris, that the Corps failed to clean the debris from the culverts, and that the debris blocked ordinary drainage, causing water to back up over plaintiffs' land. The appellants argue that section 702c should not apply in this situation because the *back up was a "man-made flood"* caused solely by the negligence of the government, and not by "unusual or extraordinary climatic conditions."

This Court has previously rejected the approach, taken by some courts, that denies immunity to the government when damage is caused solely by governmental negligence in the absence of a natural disaster. *Lunsford v. United States,* 570 F.2d 221, 228 n.13 (8th Cir. 1977); *see Florida East Coast Ry. v. United States,* 519 F.2d 1184, 1191 (5th Cir. 1975); *Parks v. United States,* 370 F.2d 92, 93 (2d Cir. 1966); *Stover v. United States,* 332 F.2d 204, 206 (9th Cir.), *cert. denied,* 379 U.S. 922 (1964). We remain firm in our belief that this is the proper rule. When Congress enacted the broad-based immunity of

---

[1]Because the complaint shows that a flood control project is involved in this case, we need not determine whether 33 U.S.C. §702c is applicable outside of the flood control context.

section 702c, it could not have intended that the government be required to prove, in each and every case, that the damage was caused by "natural" rather than "man-made" flooding. *We see no significance in the fact that the flooding in this case may not have been caused by "unusual or extraordinary climatic conditions."* Nor are we persuaded that the result should be different if the damage has been caused by *"back waters," see Taylor v. United States, supra,* 590 F.2d at 267, or by negligent maintenance and operation of a project (rather than by negligent design or construction). *See Parks v. United States, supra,* 370 F.2d at 93; *Stover v. United States, supra,* 332 F.2d at 206.

The appellants vigorously maintain that the government bears the burden of proving the affirmative defense of immunity and, therefore, dismissal on the pleadings is improper. Although it may be unusual to uphold an affirmative defense at the pleading stage, when the defense is established on the face of the complaint, dismissal is appropriate.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

NO. S79-0047-C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

PAT BURLISON, MITCHELL SMITH, JOY DECK, BOBBY DECK, TEDDY BECK, BERTHA DROKE, H. W. DROKE, BETTE DROKE, E. H. FELKER, BONNIE MARIE FELKER, TOM FELKER, RUBY MERRICK, DAVID DON PIERCE, RONNIE HAMLETT, CLIFFORD HEARING, MILVA KEATING, E. J. LANGDON, FANNIE LANGDON, JOE LANGDON, JIMMIE O. LEE, SR., H. A. LEA, JR., JACK LEE, JANE MITCHELL, BEULAH MOORE, MAX R. MOORE, LORRAINE SMOAK, JAMES A. JONES, LESLIE KINCHEN, MARION E. TUCKER, BILL TUCKER, LARRY VANCE, SAMMY DAVIS, HAROLD SCOTT, GLENDA SCOTT, ULOUS VANCE, LUEDELL VANCE, IMOGENE YOUNG and BOB HART,

Plaintiffs,

vs.

UNITED STATES OF AMERICA
Defendant.

AMENDED COMPLAINT

COUNT I

Comes now Plaintiff Pat Burlison, and for his claim for relief, states:

1. This action arises under the Federal Tort Claims Act, 60 Stat. 842, 843, 28 U.S.C.A., §1346(b) and §2671, et seq.

2. This Plaintiff and all Plaintiffs herein reside in Dunklin County, State of Missouri, and all land mentioned in this Com-

plaint is located in Dunklin County, Missouri, the same being within the Eastern District of Missouri.

3. That each and every Count contained in this Complaint is incorporated herein the same as if fully set forth in words and figures.

4. That the Defendant, acting by and through Department of Army, Corps of Engineers, its contractors, agents and employees, in the vicinity of Big Lake area and also in the vicinity of Little River Drainage District/Big Lake Drainage District Floodway, Treasure Island and Ditch No. 81 of Little River Drainage District, negligently designed and negligently constructed a road and drain in the area of same, as well as failed to place in operation the pumping plant on Treasure Island or to keep gates open or clean of drifts, which dammed the natural flow of water, or alternatively said damming was the specific cause of water backing up in great amount, or alternatively, in so doing created a "man-made flood," thereby causing damage to the land and productivity of crops thereon belonging ot this Plaintiff, as hereinafter set forth.

5. That on June 30, 1978, this Plaintiff, together with all Plaintiffs named herein, presented claim to Department of the Army, Memphis District, Corps of Engineers, for property damage, on Standard Form 95, in the amount of $3,824.16.

6. That no action was taken relative to said claims, same being neither allowed or denied within six months, and said claims were therefore denied by operation of law after the expiration of six months from the filing thereof.

7. That as the direct and proximate result of the conduct of Defendant, acting by and through its agency and agents, as aforesaid, caused damage to this Plaintiff's land and the productivity and crops thereon.

WHEREFORE, Plaintiff Pat Burlison prays judgment against Defendant in the sum of $3,824.16, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT II

Comes now Plaintiff Mitchell Smith, and for his claim of relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant upon the land owned by Plaintiff in Count I, and therefore had an interest in the growing crops and productivity on said land, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $7,685.84.

WHEREFORE, Plaintiff Mitchell Smith prays judgment against Defendant in the sum of $7,685.84, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT III

Come now Plaintiffs Joy Deck and Bobby Deck, and for their claim for relief, state:

1. Plaintiffs incorporate herein each and every allegation contained in Count I hereof.

2. That these Plaintiffs are owners of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $9,146.40.

WHEREFORE, Plaintiffs Joy Deck and Bobby Deck pray judgment against the Defendant in the sum of $9,146.40, and

for their costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT IV

Comes now Plaintiff Teddy Deck, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant upon the land owned by Plaintiffs in Count III hereof, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $18,292.80.

WHEREFORE, Plaintiff Teddy Deck prays judgment against Defendant in the sum of $18,292.80, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT V

Comes now Plaintiff Bertha Droke, and for her claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $82,000.00.

WHEREFORE, Plaintiff Bertha Droke prays judgment against the Defendant in the sum of $8,000.00, and for her costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT VI

Come Plaintiffs H. W. Droke and Bette Droke, and for their claim for relief, state:

1. Plaintiffs incorporate herein each and every allegation contained in Count I hereof.

2. That these Plaintiffs are owners of property upon which growing crops were damaged by the conduct of the Defendant, as aforesaid, in the sum of $27,500.00.

WHEREFORE, Plaintiffs H. W. Droke and Bette Droke pray judgment against Defendant in the sum of $27,500.00, and for their costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT VII

Come now Plaintiffs E. H. Felker and Bonnie Marie Felker, and for their claim of relief, state:

1. Plaintiffs incorporate herein each and every allegation contained in Count I hereof.

2. That these Plaintiffs are owners of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $13,690.00.

WHEREFORE, Plaintiffs E. H. Felker and Bonnie Marie Felker pray judgment against Defendant in the sum of $13,690.00, and for their costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT VIII

Comes now Plaintiff Tom Felker, and for his claim of relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant upon the land owned by Plaintiffs in Count VII hereof, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $6,845.00.

WHEREFORE, Plaintiff Tom Felker prays judgment against Defendant in the sum of $6,845.00, and for his costs expendeed herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT IX

Comes now Plaintiff Ruby Merrick Haire, and for her claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $1,500.00.

WHEREFORE, Plaintiff Ruby Merrick Haire prays judgment against Defendant in the sum of $1,500.00, and for her costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT X

Comes now Plaintiff David Don Pierce, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant upon the land owned by Plaintiff in Count IX hereof, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $2,500.00.

WHEREFORE, Plaintiff David Don Pierce prays judgment against Defendant in the sum of $2,500.00, and for his costs herein expended, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XI

Comes now Plaintiff Ronnie Hamlett, and for his claim for relief, states::

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant on land described herein, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant as aforesaid, this Plaintiff sustained damages in the sum of $27,600.00.

WHEREFORE, Plaintiff Ronnie Hamlett prays judgment against Defendant in the sum of $27,600.00, and for his costs herein expended, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XII

Come now Plaintiffs Clifford Keating and Milva Keating, and for their claim for relief, state:

1. Plaintiffs incorporate herein each and every allegation contained in Count I hereof.

2. That these Plaintiffs are owners of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $16,120.00

WHEREFORE, Plaintiffs Clifford Keating and Milva Keating pray judgment against Defendant in the sum of $16,120.00, and for their costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XIII

Come now Plaintiffs E. J. Langdon and Fannie Langdon, and for their claim for relief, state:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of proprety upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $24,500.00.

WHEREFORE, Plaintiffs E. J. Langdon and Fannie Langdon pray judgment against Defendant in the sum of $24,500.00, and for their costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XIV

Comes now Plaintiff Joe Langdon, and for his claim of relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant upon the land owned by Plaintiff in Count XIII hereof, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $12,250.00.

WHEREFORE, Plaintiff Joe Langdon prays judgment against Defendant in the sum of $12,250.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XV

Comes now Plaintiff Jimmie O. Lee, Sr., and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $10,150.00.

WHEREFORE, Plaintiff Jimmie O. Lee, Sr., prays judgment against Defendant in the sum of $10,150.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XVI

Comes now Plaintiff H. A. Lea, Jr., and for his claim for relief, states::

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner and tenant of land herein described and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $25,729.00.

WHEREFORE, Plaintiff H. A. Lea, Jr., prays judgment against Defendant in the sum of $25,729.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XVII

Comes now Plaintiff Jack Lee, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant on land described herein and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $40,150.00.

WHEREFORE, Plaintiff Jack Lee prays judgment against Defendant in the sum of $40,150.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XVIII

Comes now Plaintiff Jane Mitchell, and for her claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $5,658.59.

WHEREFORE, Plaintiff Jane Mitchell prays judgment against Defendant in the sum of $5,658.59, and for her costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XIX

Comes now Plaintiff Beulah Moore, and for her claim for relief, states::

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $10,861.00.

WHEREFORE, Plaintiff Beulah Moore prays judgment against Defendant in the sum of $10,816.00, and for her costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XX

Comes now Plaintiff Max R. Moore, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $22,674.00.

WHEREFORE, Plaintiff Max R. Moore prays judgment against Defendant in the sum of $22,674.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXI

Comes now Plaintiff Lorraine Smoak, and for her claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of property upon which growing crops were damaged by the conduct of Defendant, as aforeesaid, in the sum of $11,200.00.

WHEREFORE, Plaintiff Lorraine Smoak prays judgment against Defendant in the sum of $11,200.00, and for her costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXII

Comes now Plaintiff James S. Jones, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant upon the land owned by Plaintiff in Count XXI hereof, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $12,000.00.

WHEREFORE, Plaintiff James S. Jones prays judgment against Defendant in the sum of $12,000.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXIII

Comes now Plaintiff Leslie Kinchen, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was an owner and tenant of property deescribed herein, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $16,000.00.

WHEREFORE, Plaintiff Leslie Kinchen prays judgment against Defendant in the sum of $16,000.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXIV

Comes now Plaintiff Marion E. Tucker, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was an owner and/or tenant of property described herein, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $21,723.00.

WHEREFORE, Plaintiff Marion E. Tucker prays judgment against Defendant in the sum of $21,723.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXV

Comes now Plaintiff Bill Tucker, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was an owner and/or tenant of property described herein, and therefore had an interest in the growing crops and productivity thereof, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $21,723.00.

WHEREFORE, Plaintiff Bill Tucker prays judgment against Defendant in the sum of $21,723.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXVI

Comes now Plaintiff Larry Vance, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was a tenant owned by Plaintiffs in Counts XVIII and V hereof, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $71,900.00.

WHEREFORE, Plaintiff Larry Vance prays judgment against Defendant in the sum of $71,900.00, and for his costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXVII

Comes now Plaintiff Sammy Davis, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is owner of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $15,600.00.

WHEREFORE, Plaintiff Sammy Davis prays judgment against Defendant in the sum of $15,600.00, and for his costs expendeed herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXVIII

Come now Plaintiffs Harold Scott and Glenda Scott, and for relief, state:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was an owner and/or tenant of property described herein, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, these Plaintiffs sustained damages in the sum of $55,000.00.

WHEREFORE, Plaintiffs Harold Scott and Glenda Scott pray judgment against Defendant in the sum of $55,000.00, and for ther costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXIX

Come now Plaintiffs Ulous Vance and Luedell Vance, and for their claim for relief, state:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff was an owner and/or tenant of property described herein, and therefore had an interest in the growing crops and productivity thereof, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $11,318.87.

WHEREFORE, Plaintiffs Ulous Vance and Luedell Vance pray judgment against Defendant in the sum of $11,318.87, and for their costs expended herein, and for such other and

further relief as to the Court may seem meet and just in the premises.

COUNT XXX

Comes now Plaintiff Imogene Young, and for her claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

2. That this Plaintiff is the owner of property upon which growing crops were damaged by the conduct of Defendant, as aforesaid, in the sum of $6,000.00.

WHEREFORE, Plaintiff Imogene Young prays judgment against Defendant in the sum of $6,000.00, and for her costs expended herein, and for such other and further relief as to the Court may seem meet and just in the premises.

COUNT XXXI

Comes now Plaintiff Bob Hart, and for his claim for relief, states:

1. Plaintiff incorporates herein each and every allegation contained in Count I hereof.

T. That this Plaintiff was a tenant upon the land owned by Plaintiff in Count XXX hereof, and therefore had an interest in the growing crops and productivity thereon, and by reason of the conduct of Defendant, as aforesaid, this Plaintiff sustained damages in the sum of $18,000.00.

WHEREFORE, Plaintiff Bob Hart prays judgment against Defendant in the sum of $18,000.00, and for his costs expended

herein, and for such other and further relief as to the Court may seem meet and just in the premises.

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IN THE UNITED STATES COURT
OF APPEALS FOR THE
EIGHTH CIRCUIT

CIRCUIT APPEAL NO. 79-2023

PAT BURLISON, ET AL.,
Appellants
v.
UNITED STATES OF AMERICA,
Appellee

APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BRIEF OF APPELLANT

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

This cause was brought in the United States District Court, Eastern District of Missouri, Southeastern Division, by thirty-eight owners and/or tenants of land located in Dunklin County, Missouri, against the United States, for damages and injury to said land, under the Federal Tort Claims Act, 28 U.S.C., §1346(b) and §2671. The United States, referred to hereinafter as the government, filed motion to dismiss for failure of state a claim upon which relief can be granted and the cause was dismissed. Appellants, Plaintiffs below and referred to hereinafter as the owners and/or tenants, feel that oral argument is necessary for this appeal is not frivolous and the cause of action alleged involves many acres of land and severe damage thereto which affects the interests of many persons. Counsel for the owners and/or tenants is of the opinion that for the purposes of oral argument, twenty minutes would be sufficient time to present the case. Therefore, counsel for the owners and/or tenants request that this Honorable Court allow oral argument of this cause and that the Court grant to said counsel twenty minutes therefor

TABLE OF CASES

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PRELIMINARY STATEMENT

Pursuant to Local Rule 12(b), United States Court of Appeals for the Eighth Circuit, Counsel for Appellants (owners and/or tenants) state that the Honorable James H. Meredith, Chief Judge of the United States District Court, Eastern District of Missouri, rendered the decision herein appealed. The grounds on which the jurisdiction of the United States District of Missouri, was invoked is the Federal Tort Claims Act 28 U.S.C., §1346(b) and §2671, et seq. The grounds on which the jurisdiction of this Honorable Court is invoked is 28 U.S.C., §1291 and said jurisdiction rests upon the time factors set forth in 28 U.S.C., §2107.

STATEMENT OF THE ISSUE

The sole issue presented for review herein is whether or not the dismissal with prejudice by the District Court of Appellants' Amended Complaint can be supported on the basis of the allegations contained in Appellants' Amended Complaint.

Biesenbach v. Guenther, 588 F. 2d 400;
Boyce, et al v. United States, 93 F. Supp. 866;
Huffmaster v. United States, 186 F. Supp. 120;
Sanborn v. United States, 433 F. Supp. 651;
Seven-Up Bottling Co., v. Seven-Up Co., 561 F. 2d 1275;
Sun Communications, Inc., v. Waters Publications, Inc., 466 F. Supp. 387;
28 U.S.C., §1346(b) and §2671, et seq.;
28 U.S.C., §2680(a);
33 U.S.C. 702c;
Federal Rules of Civil Procedure, Rule 8(d);
Federal Rules of Civil Procedure, Rule 12(b) (6).

STATEMENT OF THE CASE

Appellants (Plaintiffs below and hereinafter referred to as owners and/or tenants) bring this action for damages against the United States of America (Defendant below and hereinafter referred to as the government) under the Federal Tort Claims Act, 28 U.S.C., §1346(b) and §2671, et seq. The government filed a motion to dismiss pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure and the District Court granted the government's said motion to dismiss and dismissed owners' and/or tenants Complaint without prejudice. Prior to receipt of notice that the government's motion to dismiss had been granted, owners and/or tenants filed motion for leave to file Amended Complaint which was granted and said Amended Complaint was filed. Thereupon, the government filed its response to the Owners' and/or tenants' Amended Complaint. On September 27, 1979, the District Court ordered that the motion of the government to dismiss the owners' and/or tenants' Complaint as amended be granted, incorporating in said order the District Court's Memorandum dated September 4, 1979, and the cause was dismissed with prejudice.

Considering the nature of the case, the course of proceedings and the disposition in the court below, a statement of the facts relative to the issue presented herein for review will of necessity be brief and concise. Owners' and/or tenants' Complaint, Appendix pages 2-12, was properly filed in the United States District Court, Eastern District of Missouri, Southeastern Division, on May 21, 1979. Paragraph 4 of Count I, Appendix pages 2-3, which is incorporated in each and every Count contained in said Complaint, allegees nad avers:

> "4. That the Defendant, acting by and through Department of Army, Corps of Engineers, its contractors, agents and employees, in the vicinity of Big Lake area (dealing also with Little River Drainage District/Big Lake Drain-

age District Floodway, and Treasure Island and in vicinity along Ditch No. 81 of Little River Drainage District) enacted certain "control structures" and "access road" to same, as well as failed to place in operation the pumping plant on Treasure Island or to keep gates open or clear of drifts, which dammed the natural flow of water, or alternatively said damming was the specific cause of water backing up in great amount, or alternatively, in so doing created a "man-made flood," thereby causing damage to the land and productivity or crops thereon belonging to this Plaintiff as hereinafter set forth."

On July 23, 1979, the government filed its Answer, Appendix pages 24-26, and on August 6, 1979, the government filed its Motion to Dismiss, pursuant to Rule 12(b (6) of the Federal Rules of Civil Procedure, with memorandum in support thereof, Appendix pages 27-32. On September 4, 1979, the District Court granted the motion of the government to dismiss without prejudicee and filed its Order and Memorandum, Appendix pages 33-35, relative thereto.

In the Court's Order and Memorandum of September 4, 1979, Appendix pages 33-35, the Court states as follows, to-wit:

"Plaintiffs allege that the flood control structure erected by the government caused damages to plaintiffs' land and/or crops.

"The government admits constructing flood control structures pursuant to the Flood Control Act of 1950, but moves to dismiss plaintiffs' complaint on the basis of statutory immunity.

"The government asserts that it is immune under the Federal Tort Claims Act from liability "... for the exercise or failure to exercise ... a discretionary founction ... or for actions taken to execute a federal statute," 28 U.S.C., §2680(a). Thus the government contends that the Tort Claims Act, which forms the basis of plaintiffs' complaint, also precludes recovery by means of the "exception" provisions of 28 U.S.C., §2680(a).

"Liberally construing plaintiffs' complaint, no facts are alleged which would take the complaint outside the scope of immunity afforded the government under the Federal Tort Claims Act. The breadth of immunity provided under 28 U.S.C., §2680(a) was emphasized by the Supreme Court in *Delenhite v. United States,* 345 U.S. 15, 30 (1953). As such, 28 U.S.C., §2680(a) precludes plaintiff from pursuing its complaint under the Federal Tort Claims Act. Because this is the only basis for federal jurisdiction over plaintiffs' claim, it must be dismissed."

However, prior to the receipt of notice by the owners and/or tenants of the Court's Order and Memorandum granting the government's Motion to Dismiss, the owners and/or tenants moved for leave to file Amended Complaint, which said motion was granted and the owners' and/or tenants' Amended Complaint, Appendix pages 13-23, was filed. Paragraph 4 of Count I of said Amended Complaint, Appendix pages 13-14, which is incorporated in each and every Count contained in said Amended Complaint, alleges and avers:

"4. That the Defendant, acting by and through Department of Army,, Corps of Engineers, its contractors, agents and employees, in the vicinity of Bog Lake area and also in the vicinity of Little River Drainage District/Big Lake Drainage District Floodway Treasure Island and Ditch No. 18 of Little River Drainage District, negligently designed and negligently constructed a road and drain in the area of same, as well as failed to place in operation the pumping plant on Treasure Island or to keep gates open or clean of drifts, which dammed the natural flow of water, or alternatively said damming was the specific cause of water backing up in great amount, or alternatively, in so doing created a "man-made flood," thereby causing damage to the land and productivity or crops thereon belonging to this Plaintiff, as hereinafter set forth."

The government adopted its Motion to Dismiss and memorandum in support of its Motion to Dismiss filed August 3, 1979, Appendix pages 27-32, in response to owners' and/or tenants' Complaint, as its response to owners' and/or tenants' Amended Complaint alleging that the owners' and/or tenants' Amended Complaint contained no new factural or legal allegations. On September 27, 1979, the Court ordered that the motion of the government to dismiss the owners' and/or tenants' Complaint as amended be granted, dismissed the cause with prejudice, and filed its Order, Appendix page 36, relative thereto, incorporating therein the Court's Memorandum dated Seeptember 4, 1979, Appendix pages 34-35.

ARGUMENT

It is the contention of the owners and/or tenants that the District Court erred in granting the government's Motion to Dismiss for failure to state a claim upon which relief can be granted. In deciding a motion to dismiss, the Court must take as true the material facts pleaded in the owners' and/or tenants' Amended Complaint, *Sun Communications, Inc. v. Waters Publications, Inc.*, 466 F. Supp. 387, (1979) D.C. Mo., and the Court "must limit its consideration to the facts alleged in the complaint." *Biesenbach v. Guenther,* 588 F. 2d 400 (1978) 3d Circuit, at page 402. "No claim may be dismissed under Rule 12(b) (6) for a failure to state a claim unless it appears beyond doubt that plaintiff cannot obtain any relief." *Seven-Up Bottling Co. v. Seven-Up Co.*, 561 F. 2d 1275 (1977) 8th Circuit.

In the Order and Memorandum of the District Court filed on September 4, 1979, Appendix pages 33-35, the Court made a determination that the owners' and/or tenants' cause of action set forth in the owners' and/or tenants' Complaint and Amended Complaint involves a "flood control structure." The

owners and/or tenants state that the Amended Complaint filed herein contains no allegation directed to any "flood control structure." While it is true that the Complaint titled herein does refer to "control structures" and "access road" to same, the Complaint does not refer to "flood control structures." The characterization of the "control structures" as "flood control structures" can only be attributable to Paragraph 1 of the Affirmative Defenses of the government's Answer, Appendix pages 27-32. As to the characterization by the government of facts in issue, the owners and/or tenants state that they are not bound by the pleadings of the government; and averments in a pleading, such as the government's Answer, to which no responsive pleading is required or permitted, shall be taken as denied or avoided. Rule 8(d), Federal Rules of Civil Procedure states:

> "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

Further, the owners and/or tenants state that their Complaint or their Amended Complaint, Appendix pages 2-23, do not allege as fact that the damages claimed in their Complaint or Amended Complaint resulted from activities of the government related to a "flood control structure" thereby bringing the activity of the government within the immunity of the Flood Control Act, 33 U.S.C., §702(c). In the case of *Sanborn v. United States,* 453 F. Supp. 651 (1977) D.C. Cal., at page 657, the Court stated:

> "The government argues that the plaintiffs have the burden of pleading facts which indicate that the Section 702c immunity does not apply. No authority is offered. Since this immunity is an affirmative defense, the court

> must reject the government's argument and find that the pleading burden with respect to the immunity is on the government. FRCP 8(c) . . . the plaintiffs need not plead in a manner to bring their claims outside the immunity. . . "

Also, in said Order and Memorandum of the Court dated September 4, 1979, Appendix pages 33-36, the Court finds as a matter of law and as a matter of fact that the Amended Complaint of the owner and/or tenant, Appendix pages 13-23, alleges no facts "which would take the complaint outside the scope of immunity afforded the goverment under the Federal Tort Claims Act."

In the case of *Boyce, et al v. United States,* 93 F. Supp. 866 (1950) D.C. Iowa, at page 868, the Court states:

> "Unless the pleeadings show upon their face the applicability of the "discretionary function" exception contained in Section 2680(a), supra, the same must be raised by way of an affirmative defense and the burden therefore devolves upon the Government to establish its applicability."

The owners and/or tenants assert that the Complaint and Amended Complaint, Appendix pages 2-23, and the allegations contained therein do not show upon their face that the §2680(a) applies in this matter, but to the contrary, said allegations set forth sufficient allegations of negligence in the performance by the government of an operational function so as to state a claim upon which relief can be granted against the government.

The owners and/or tenants state that issues of fact have been raised precluding dismissal of their Amended Complaint by virtue of the government's Motion to Dismiss on the ground of exemption of the United States under 33 U.S.C. 702c stat-

ing that the United States should have no liability for any damage by floods or flood waters, and on the ground of exemption of the United States under 28 U.S.C. 2680(a) based on the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee, and this is supported by the case of *Huffmaster v. United States,* 186 F. Supp. 120 (1960) D.C. Cal., at page 124, wherein the Court states:

> "Defendant's motion to dismiss on the ground of exemption of the United States under Title 33 U.S.C.A. §702c, and the motion to dismiss on the "discretionary function" exemption, each raise issues of fact *(Guy F. Atkinson Co., v. Merritt, Chapman, & Scott Corp.,* D.C., 126 F. Supp. 406) Such being the case, defendant's moto dismiss on these grounds may not be granted at this time *(State of California v. United States,* D.C., 151 F. Supp. 570)"

CONCLUSION

Considering only the owners' and/or tenants' Amended Complaint, with the allegations therein being taken as true, the owners and/or tenants contend that the District Court erred in finding that it lacked jurisdiction because the owners and/or tenants failed to allege facts which would take the complaint outside the scope of immunity afforded the government under the Federal Tort Claims Act and therefore making a determination, based solely upon the pleadings of the owners and/or tenants that beyond doubt the owners and/or tenants cannot prove a set of facts under which they could recover. The owners and/or tenants suggest and contend that the dismissal by the District Court was error and that the decision of the District Court should be reversed and the cause remanded for a determination on the merits. Therefore, the owners

and/or tenants request this Honorable Court to reverse the decision of the District Court and remand this cause to the District Court for a trial on the merits.

Respectfully submitted

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No. 79-2023
CIVIL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PAT BURLISON, ET AL
Appellants
vs.
UNITED STATES OF AMERICA
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF OF APPELLEE

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IN THE
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PAT BURLISON, ET AL
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NO. 79-2023
CIVIL

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IN THE
UNITED STATES COURT OF APPEALS
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 79 2923

PAT BURLISON, ET AL
Appellants
v.
UNITED STATES OF AMERICA
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

APPELLEE'S BRIEF

ISSUES PRESENTED FOR REVIEW

I.

WHETHER THE ACTS COMPLAINED OF BY PLAINTIFFS FALL WITHIN THE DISCRETIONARY FUNCTION EXEMPTION CONTAINED WITHIN THE FEDERAL TORT CLAIMS ACT.

Miller v. United States, 410 F.Supp. 425 (E.D. Mich. 1976)

Wright v. United States, 568 F.2d 153 (10th Cir. 1978)

Spillway Marina, Inc. v. United States, 445 F.2d 876 (10th Cir. 1971)

Irzyk v. United States, 412 F.2d 749 (10th Cir. 1969)

Casey v. Hoover, 89 S.W. 330 (Mo. App. 1905)

Anderson v. Cahill, 489 S.W.2d 76 (Mo. 1972)

Dale v. United States, 346 U.S. 15 (1953)

Dolphin Gardens, Inc. v. United States, 243 F.Supp. 824 (D. Conn. 1964)

II.

WHETHER THE UNITED STATES IS IMMUNE FROM DAMAGE RESULTING FROM FLOODS OR FLOOD WATER.

Stover v. United States, 332 F.2d 204 (9th Cir. 1964)

Callaway v. United States, 568 F.2d 684 (10th Cir. 1978)

Florida East Coast Ry. v. United States, 519 F.2d 1184 (5th Cir. 1975)

STATEMENT OF THE CASE

Plaintiffs filed suit in District Court alleging that the "Army, Corps of Engineers, its contractors, agents and employees, in the vicinity of Big Lake area, (dealing also with Little River Drainage District/Big Lake Drainage District Floodway, and Treasure Island and in vicinity along Ditch No. 81 of Little River Drainage District) enacted certain 'control structures' and 'access road' to same, as well as failed to place in operation the pumping plant on Treasure Island or to keep gates over or clear of drifts, which dammed the natural flow of water, . . . created a 'man-made flood,' thereby causing damage to the land and productivity or crops thereon. . . " This wording is also contained in plaintiff's administrative tort claims (SF 95). Defendant filed an Answer admitting that it constructed the "control structures" and "access road".

Following the filing of defendant's Motion to Dismiss and Memorandum, plaintiffs amended their Complaint to delete the words "control structures" and "access road to same" and

replaced them with "negligently designed and negligently constructed a road and drain in the area of same . . ." retaining the allegations as to the pumping plant and man-made flood and the vicinity of the Big Lake area and Little River Drainage District/Big Lake Drainage District Floodway.

In its Order of September 27, 1979 incorporating its Memorandum of September 4, 1979, the District Court dismissed plaintiffs' Complaint for lack of subject matter jurisdiction under the Federal Tort Claims Act. Plaintiffs are now appealing from that ruling. Because plaintiffs' Complaint alleges facts which fall within the discretionary function exemption of the Federal Tort Claims Act, 28 U.S.C. Section 2680(a) and within the immunity provided by Section 702(c) of Title 33 U.S.C., the decision of the District Court should be upheld.

ARGUMENT

I.

THE ACTS COMPLAINED OF BY PLAINTIFFS FALL WITHIN THE DISCRETIONARY FUNCTION EXEMPTION CONTAINED WITHIN THE FEDERAL TORT CLAIMS ACT.

In his Memorandum Opinion Judge Meredith found that "liberally construing the complaint, no facts are alleged which would take the complaint outside the scope of immunity afforded the government under the Federal Tort Claims Act." The appropriateness of dismissal based on this rationale was not altered by the amendment of the Complaint. Said Amended Complaint alleges the negligent design and construction of a road and drain in the area of Big Lake, Big Lake Drainage District, Big Lake Drainage District Floodway, Treasure Is-

land, and Ditch No. 81 of Little River Drainage District; and failure to place in operation the Treasure Island pumping station, and/or keep its gates open and/or clean of drifts.

The discretionary function exception to the Federal Tort Claims Act is a jurisdictional bar to suit, inasmuch as it is an exception to the waiver of sovereign immunity. The design and construction of a road and drain by the Corps of Engineers, as well as the placing in operation and clearing of gates of a pumping plant in a flood control area are all within the discretionary function exemption. *Miller v. United States,* 410 F.Supp. 425 (E.D.Mich. 1976). In *Miller,* defendant Corps of Engineers allegedly negligently impounded and then released water into the Great Lakes. Over plaintiff's claim that the operation of the control works was in fact at the operational, rather than policy level, the court held that the damage was caused by a discretionary act.

The construction and design of the "road" also come within Section 2680(a). In *Wright v. United States,* 568 F.2d 153 (10th Cir. 1978), the allegedly negligent design and construction of a bridge and approach road was held to be a discretionary function. *See also Spillway Marina, Inc. v. United States,* 445 F.2d 876 (10th Cir. 1971); *Irzyk v. United States,* 412 F.2d 749 (10th Cir. 1969). The Court in *Wright* noted that that under the law of Utah, "a contractor is not liable for resultant injuries if he has merely carried out plans, specifications and directions given to him by an employer . . . ." *Wright* at 157. This appears to be the law in Missouri as well. *Casey v. Hoover,* 89 S.W. 330 (Mo. App. 1905). *See also, Anderson v. Cahill,* 489 S.W.2d 76 (Mo. 1972).

There is no exact test to determine discretionary acts from those outside the scope of the exception. *Dale v. United States,* 346 U.S. 15 (1953); *Dolphin Gardens, Inc. v. United States,*

243 F.Supp. 824 (D.Conn. 1965). In *Dolphin Gardens,* the United States contracted to have certain material dredged from a river bed and deposited 1½ miles from plaintiff's apartment buildings which became damaged by fumes from the spoil. The Court found that the damage resulted from "an affirmative decision to act or not to act" by the government and therefore could not be compensated under the Federal Tort Claims Act. The building of a structure and road and the failure to place in operation the Treasure Island pumping station or to keep its gates open and/or clear in this case are obviously the result of affirmative decisions by the Corps of Engineers, such as was true in *Dolphin.* Therefore, the Court's decision should be upheld on this basis.

II.

THE UNITED STATES IS IMMUNE FROM DAMAGE RESULTING FROM FLOODS OR FLOOD WATER.

Section 702(c) of Title 33, United States Code, states that:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by any floods or flood water at any place . . . "

This immunity extends to damage from man-made floods as well as that from natural flooding. *Stover v. United States,* 332 F.2d 204 (9th Cir. 1964). It applies regardless of whether negligence existed on the part of the government. *Callaway v. United States,* 568 F.2d 684 (10th Cir. 1978). And it is not relevant that the water involved is backwater. *Taylor v. United States,* 590 F.2d 263 (8th Cir. 1979).

Because plaintiffs allege in their Complaint that their damage resulted from the damming of water, the only question

present in this case is whether this damming occurred in connection with a flood control project. See *Florida East Coast Ry. v. United States,* 519 F.2d 1184 5th Cir. 1975). Plaintiffs' reference to the Army Corps of Engineers, the pumping station, and to the drain and road in the vicinity of Ditch No. 81, Big Lake Drainage District, Little River Drainage District make it abundantly clear that the allegedly negligent acts *were* done in connection with a flood control project.

If, however, the Court finds that further evidence is needed to place this case more clearly within the discretionary function exemption to the Federal Tort Claims Act, and/or the immunity provided by 33 U.S.C. Section 702(c), it may wish that this case be remanded by further proceedings, such as summary judgment proceedings.

CONCLUSION

WHEREFORE, for the above stated reasons, it is respectfully requested that the Order of the District Court dismissing plaintiffs' Complaint be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief was mailed this 13th day of February, 1980, to:

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§702(c). Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights

Except when authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of sections 702a, 702b to 702d, 702h to 702j, 702k, 702l, and 702m of this title shall be expended on the construction of any item of the project until the Statees or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 702d of this title; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of the Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place:: *Provided, however,* That if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h to 702j, 702k, 702l, and 702m, of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

May 15, 1928, c. 569, §3, 45 Stat. 535.

CASES CITATION OF CONFLICTING DECISIONS ON THE SCOPE OF IMMUNITY UNDER 702(c)

National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), cert. denied 347 U.S. 967, 74 S. Ct. 778, 98 L.Ed. 1108 (1954)

Graci v. United States, 301 F. Supp. 947, 953 (E.D.La. 1969), 456 F.2d 20, 23 (5th Cir. 1971)

In Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 126 F.Supp. 406 (N.D. Cal. 1954)

Valley Cattle Company v. United States, 258 F.Supp. 12 (D. Hawaii 1966)

Stover v. United States, 204 F.Supp. (N.D.Cal. 1962), aff'd, 332 F.2d 204 (9th Cir. 1964), cert. denied, 379 U.S. 922, 85 S. Ct. 276, 13 L.Ed.2d 335 (1964)

Lunsford v. United States, 418 F.Supp. 1045, 1054 (D.S.D. 1976)

Florida East Coast Railway Company v. United States, 519 F.2d 1184 (5th Cir. 1975)

McClaskey v. United States, 386 F.2d 807 (9th Cir. 1967)

Parks v. United States, 370 F.2d 92 (2d Cir. 1966)

Stover v. United States, 332 F.2d 204 (9th Cir.) cert. denied, 379 U.S. 922, 85 S.CT. 276, 13 L.Ed.2d 335 (1964)

Clark v. United States, supra

Ponderemdolph v. Derry Township, 330 F.Supp. 1346 (W.D. Pa. 1971)

B Amusement Company v. United States, 180 F. Supp. 386, 148 Ct.Cl. 337 (1960)

Villarreal v. United States, 114 F. Supp. 662 (W.D.Mo. 1963).